United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5020

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

P/s

IN THE MATTER

of

ISRAEL-BRITISH BANK (LONDON) LIMITED,
Bankrupt.

ISRAEL-BRITISH BANK (LONDON) LIMITED,
Appellant,

FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor in interest to Franklin National Bank,
and
BANK OF THE COMMONWEALTH,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION

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Counter-Statement of the Issue Presented for Review

Is a foreign banking corporation excluded from becoming a voluntary bankrupt pursuant to Section 4(a)[11 U.S.C. § 22(a)] of the Bankruptcy Act?

Counter-Statement of Relevant Facts

It is not disputed that appellant Israel-British Bank (London) Limited ("IBB") was organized under the laws of the United Kingdom as a corporation, and was there authorized to and did function as a bank, carrying on traditional banking activities until on or about August 2, 1974, when it petitioned the High Court of Chancery for the winding-up of its affairs. Brief for Appellant at 3, 29. The entity being liquidated today under the laws of the United Kingdom is a banking corporation. These are the only facts relevant to a decision on this appeal, despite IBB's proliferation in its Brief of facts concerning the levels of its past and present activities in the United States.

The standing of the Federal Deposit Insurance Corporation ("F.D.I.C.") and of the Bank of the Commonwealth ("Commonwealth") to challenge the bankruptcy court's jurisdiction is similarly undisputed, having been decided affirmatively by the bankruptcy court. Joint Appendix at (A-) -42. Such determination was not appealed from or challenged further by IBB.

Appellee F.D.I.C. is a party to this matter as the successor in interest to Franklin National Bank ("Franklin"). Franklin's interest arose out of IBB's failure to repay on July 11, 1974, the principal and interest of more than $2.1 million owing on a Euro-dollar Deposit made by Franklin. (A-19, -20) On July 26, 1974, Franklin, then a banking corporation organized under the laws of the United States, filed a complaint in the United States District Court for the Southern District of New York, styled *Franklin National Bank* v. *Israel-British Bank (London) Ltd.*, 74 Civ. 3232, seeking repayment of the Euro-dollar Deposit. (A-21, -22) That same day, Franklin also utilized the protective statutory procedures afforded by New York, the state where it

maintains its statutory place of business, to obtain an Order of Attachment which was served on a number of banking institutions in New York City. (A-14) IBB failed to plead in the civil action and on November 1, 1974, Franklin obtained judgment by default against IBB. On December 11, 1974, F.D.I.C. was substituted as a party plaintiff therein. F.D.I.C. was stayed from enforcing its judgment pursuant to New York law by reason of the filing of IBB's bankruptcy petition.

SUMMARY OF ARGUMENT

F.D.I.C. submits that the clear and unambiguous language of Section 4(a) of the Bankruptcy Act (the "Act") excludes all banking corporations, without exception, from the benefits of the Act. This conclusion follows necessarily from the only internally-consistent reading of the language of the Act. IBB, as an admitted banking corporation organized under the laws of the United Kingdom, having been authorized to carry on a banking business and having done so, is thus expressly excepted from those entitled to file a voluntary bankruptcy petition. Moreover, as Section 4(a) is a predicate for the court's subject matter jurisdiction under the Act, the court below properly dismissed IBB's petition (Point I).

F.D.I.C. further submits that the history of the language used in Section 4 since its original enactment in 1898 demonstrates that banking corporations were never allowed to file voluntary petitions or be adjudged involuntary bankrupts. Furthermore, Section 4 at no time distinguished between domestic and foreign persons. The use of generic language in the Section 4 corporate exceptions, confirmed by judicial decisions dealing with those exceptions, supports their absolute quality. Any other reading of these exceptions

leads to a morass of unsupported and unguided distinctions. There has never been any basis in the Act for the inclusion of any banking corporation, foreign or domestic (Point II).

The clarity of the consciously chosen statutory language used in Section 4 as amended since 1898, coupled with precise analyses and explanations by its draftsmen and sponsors, provide conclusive evidence of the intended operative effect of Section 4. Such reliable evidence of congressional intent as to the operative meaning of Section 4 requires that it be given a plain reading which excludes foreign as well as domestic banking corporations (Point II).

F.D.I.C. submits that any attempt to probe behind the clear congressional intent to discern subjective purposes for the Section 4 exceptions is unwarranted, and wrongly seeks to replace "analysis of the statute by psychoanalysis of Congress." Moreover, it is evident that such a search is fruitless and fails to disclose any single guiding purpose or predominant purposes for the exceptions. In contradistinction to the very clear and consistent evidence demonstrating Congress's intended effect by the statutory words chosen (Point II), the Act's legislative history on the point of what purposes Congress wanted to accomplish, in 1898 and thereafter, "has something for everyone" (Point III).

To the extent that legislative history contained in debates and committee hearings and reports are looked to at all and are appropriately weighted, such sources support only the conclusion that Congress did not purposefully deal with or even consider a distinction between foreign and domestic (banking) corporations. Furthermore, F.D.I.C. submits that the court below correctly found that those underlying purposes which could be attributed to the Section 4 exceptions apply equally to foreign and domestic corporations. In any event, such purposes are not clearly at

odds with the plain language of the Act excluding all banking corporations, foreign or domestic (Point III).

IBB focuses on the equality of distribution of assets afforded those persons covered by the Act. While equality of distribution is certainly an aim of the Act, the aim was never intended to be directed to those entities excluded from the benefits of the Act. F.D.I.C. suggests that the inclusion of foreign banking corporations as eligible for the benefits of the Act would be tantamount to new legislation, a result this court should eschew. (Point IV).

For the foregoing reasons, the plain language of the Act controls the disposition of this appeal, and the decision of the court below dismissing IBB's voluntary bankruptcy petition should be affirmed.

ARGUMENT

POINT I

IBB Is Not Entitled to the Benefits of The Bankruptcy Act as a Voluntary Bankrupt Since Section 4(a) Excludes In Plain and Unambiguous Language Banking Corporations Without Limitation.

Judge Morris E. Lasker rendered a comprehensive and well-reasoned opinion below in this case reversing the bankruptcy court's decision and granting the motions of the Federal Deposit Insurance Corporation and Bank of the the Commonwealth to dismiss IBB's voluntary petition for bankruptcy adjudication (A-52 to -89). Although Judge Lasker examined the statutory and legislative history, judicial opinions, and legal scholarship presented as relevant to this issue of first impression, he, nevertheless, properly recognized that "the words of a statute are of course the primary tool in divining legislative intent * * *." (A-59).

Flora v. *United States*, 357 U.S. 63, 65 (1958). He concluded:

> "Where scrutiny of the legislative history unearths no clue that Congress has considered application of the statute to the particular facts at hand and where adherence to the statutory words themselves does not frustrate the general objectives of the legislation, the words must be given effect as they read." (A-88)

IBB submits that Judge Lasker correctly held that the clear language of Section 4(a) precludes IBB as a foreign banking corporation from seeking adjudication as a voluntary bankrupt.

A. The Express Language of Section 4(a) Excludes All Banking Corporations.

The manifest purpose of Section 4 of the Bankruptcy Act is to define clearly and categorically those persons who may become voluntary and involuntary bankrupts:

> "§ 4. WHO MAY BECOME BANKRUPTS. a. Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> b. Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act.***" 11 U.S.C. § 22 (1938).

Section 1(23) of the Act defines "persons" to include corporations, and Section 1(8) of the Act defines "corporation" in terms clearly encompassing foreign corporations such as IBB. *See* generally Nadelmann, *The National Bankruptcy Act and the Conflict of Laws,* 59 Harv. L. Rev. 1025, 1035 *et seq.* (1946). Section 2(a)(1) of the Act enables United States courts to adjudicate as a bankrupt "persons * * * who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction * * *." 11 U.S.C. § 11(a)(1).

In short, the Act is structured to allow any person, including foreign corporations with assets in the United States, to file a petition for voluntary bankruptcy, *except* for certain categories of corporations. The exception for these categories, including banking corporations, is expressed in unambiguous, unqualified language. IBB in its Brief has not pointed to a single provision of the Act which lends support to the view that the words "banking corporation" are ambiguous.

The application of customary canons of statutory construction requires that the Act be read as a whole. *NLRB* v. *Lion Oil Co.,* 352 U.S. 282, 288 (1957). As the lower court said, "Whatever the helpfulness of maxims of construction in general, common sense dictates that the same words used in different parts of the same statutory provision should, absent evidence to the contrary, be accorded the same meaning." (A-69). The term "corporation" appears twice in Section 4(b) of the Act, *e.g.,* a "commercial corporation" is included, a "banking corporation" is excluded.* Since the

* While F.D.I.C does not agree that the legislative history of Section 4(b) necessarily determines Section 4(a)'s construction, the rational assumption, nowhere contradicted by IBB, is that the defined term "corporation" was used in the same sense throughout Section 4. *In re Island Mortgaging Corp.,* 18 F.Supp. 448, 450 (E.D.N.Y. 1937).

first usage includes foreign corporations, Congress could not conceivably have intended to limit the second usage to domestic corporations without explicit language. *Cf. Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 149-50 (1944). Attribution of different meaning to the same defined word used twice in a single sentence flies in the face of the simplest and most basic rules of draftsmanship and word usage.

IBB argues for a "strict construction" of the exceptions in Section 4(a) and (b), citing numerous authorities. The canon of strict construction, however, would never support a holding of non-coverage where the words of a statute are squarely applicable to the actual character of the entity under consideration. *See* 2A Sutherland, *Statutory Construction* § 58.02, n. 4, 6 (4th ed. 1973); *United States* v. *Boston & Maine R. Co.,* 380 U.S. 157, 162 (1965); *United States* v. *Dickson,* 15 Pet. 141, 164-65 (1841) (opinion by Justice Story) cited in Brief for Appellant at 8-9; *Korherr* v. *Bumb,* 262 F.2d 157, 162 (9th Cir. 1958). IBB, an admitted "banking corporation", is within the Section 4 banking corporation exception under the strictest view of the statutory language since the words of the Act compel the exclusion of all banks, foreign as well as domestic.

In short, any reading of the language of Section 4(a)—strict, plain, contextual or common-sense—allows room for [illegible]e conclusion, that the Section 4(a) exception applies [illegible] banking corporations, including foreign banks such as IBB.

B. IBB is a Banking Corporation Under Section 4(a).

Attempting to avoid its exclusion, IBB argues that it is not a banking corporation under Section 4 of the Act because it never carried on a banking business in the United States and was not licensed to do business anywhere in the

United States. Brief for Appellant at 29-33. The court below refused to accept this attempt by IBB to prescribe a test of eligibility for bankruptcy which requires a factual inquiry into its local activities (A-56, -57). This court, on solid authority, should do likewise.

Previous opinions of this court and bankruptcy law generally are clear on the point that the powers conferred on a corporation by the laws of its creation, and its capacity to so act (*e.g.*, as a bank, to receive deposits), not its actual business activities, are decisive in determining whether that corporation falls within the excepted categories of Section 4. *Union Guarantee & Mortgage Co.* v. *Van Shaick,* 75 F.2d 984, 985 (2d Cir.), *cert. denied,* 296 U.S. 594 (1935) (insurance corporation); *In re Prudence Co.,* 79 F.2d 77, 79-80 (2d Cir.), *cert. denied,* 296 U.S. 646 (1935) (banking corporation); *Sims* v. *Fidelity Assurance Ass'n.,* 129 F.2d 442, 448 (4th Cir. 1942), *aff'd.,* 318 U.S. 608 (1943) (insurance corporation); *Gamble* v. *Daniel,* 39 F.2d 447, 450 (8th Cir.), *appeal dismissed,* 281 U.S. 705, *cert. denied,* 282 U.S. 848 (1930). It appears, then, that IBB is undeniably a "banking corporation" both by charter and by the nature of its authorized business activities in the United Kingdom.

IBB's emphasis on a lack of actual business done in the United States is meaningless in view of Congress's desire, in enacting the present scheme of exceptions in 1910, to eliminate determinations of jurisdiction based on factual inquiries into business done. In sponsoring the 1910 amendments on the House floor, Congressman Sherley supported "scientific classification" of corporations, *see* Brief for Appellant at 16-17, and continued:

> "The old law provided that 'a corporation *engaged principally* in manufacturing, trading, printing, publishing, mining or mercantile pursuits' could be put into bankruptcy, * * * and you have some very

> strange decisions. * * * So, instead of having them enumerated, I have adopted the scientific way of declaring a class and then stating the exceptions to the class." 45 Cong. Rec. 2275 (1910) (emphasis added).

The business activity test had proved difficult to apply; therefore, Cong. Sherley emphasized the nature and class of excepted corporations, rather than the amount or place of their business activities. Indeed, this emphasis is reflected throughout the legislative history, the judicial discussions and the commentaries cited by IBB in its Brief.

The United States Supreme Court has rejected IBB's "business inquiry" argument in the case of *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348 (1920), a Section 4 Bankruptcy Act case. The Supreme Court found that while "the Act of 1898 made jurisdiction depend upon an inquiry of fact * * * [t]he Act of June 25, 1910, which covers the present proceeding is peremptory in its prohibition." *Id.* at 355. In short, IBB's argument based on a factual inquiry into actual business done has no place in a jurisdictional determination.

As the court below noted, the corporations listed in Section 4(a) are described only with reference to the *character* of the entities, not to the extent, if any, of actual operation:

> "There is no provision in the Act which states that a foreign corporation must *operate* as a bank within the United States in order either to enjoy the benefits of bankruptcy or to fit within the Act's exceptions, and of course the courts cannot write such a requirement into the Act." (A-56 to -57).

IBB's suggested criterion would force bankruptcy courts into the same fruitless inquiries eliminated from 1910 onwards by the express language of the Act. As Judge

Lasker correctly concluded, IBB's argument "does not w[illegible]sh." (A-56).

C. Inclusion Under Section 4 is Necessary To Establish Jurisdiction of the Bankruptcy Court.

In Point II.E of its Brief, IBB contends that pursuant to Section 2(a)(1) of the Act, 11 U.S.C. § 11(a)(1), "location of assets within the United States is sufficient to give bankruptcy jurisdiction." Brief for Appellant at 35. IBB cites no statutory or judicial authority for this proposition. In point of fact, IBB's argument is untenable and has been rejected by the United States Supreme Court, by other courts, including the court below (A-57, -86 n. 2), and by numerous commentators.

The Section 2(a)(1) issue was properly labeled as academic and avoided by the court below. (A-86 n. 2). Section 4 is clearly a jurisdictional provision and a predicate to subject matter jurisdiction, which *must* be met by any petitioner, including IBB, to gain the benefits of bankruptcy. The issue has been expressly decided by the Supreme Court. "The effect of these provisions [Section 4(a) and (b)] is that there is no statute of bankruptcy as to the excepted corporations and necessarily there is no power in the District Court to include them." *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 355 (1920).

In any event, the preponderance of authority on the point construes Section 2(a)(1) as a venue, not a jurisdictional provision. 1 Collier, *Bankruptcy* ¶ 2.14 (14th ed. 1975); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 36, 37 (1962). "It was the inartful use of the word that created the impression that § 2a(1) was strictly jurisdictional. When it is realized, however, that two distinct ideas are involved, the conclusion that § 2a(1) relates

to venue rather than jurisdiction is inescapable. * * * While § 2a(1) uses the term 'jurisdiction' with reference to territorial limitations, it does so only within the context and meaning of the term 'venue'." *Id.* at 36, 37. Cases in this jurisdiction support the same conclusion. *See Saper* v. *Long,* 131 F. Supp. 795, 796 (S.D.N.Y. 1955), *aff'd. sub nom., Saper* v. *West,* 263 F.2d 422 (2d Cir. 1959).

It has never been suggested by any court or commentator that a corporation expressly excluded from "the benefits of this Act" by Section 4 may nevertheless be adjudicated a bankrupt pursuant to the general provisions in Section 2(a)(1). With respect to the opinions of Dr. Nadelmann and the other authorities relied on by IBB, F.D.I.C. submits that they never addressed this issue nor made this contention. Neither Dr. Nadelmann's articles, nor cases or other authorities cited by IBB, focused at all on the question of whether the Section 4 exceptions are limited to domestic corporations, as IBB would have this court believe. *See* Brief for Appellant at 21, 34-38. While Section 2(a)(1) may be a *necessary* minimal requirement for jurisdiction over a foreign corporation with no connection with the United States except for assets in the jurisdiction, coverage under Section 2(a)(1) is *not sufficient* to confer jurisdiction over a foreign corporation which fails to qualify under Section 4(a) or (b) as a person eligible to receive the benefits of the Act. *Vallely* v. *Northern Fire Ins. Co., supra.*

* * *

In sum, a conclusion that foreign banking corporations are subject to the Act would require careful redrafting by this court of Section 4(a). What IBB asks is that this court read into the clear and generic language of the Section 4 exceptions some further qualifying language. In

doing so, this court would have difficult and largely unguided determinations to make.* Moreover, the precedent set by this court would force bankruptcy courts in the future to make in each case preliminary, and often extensive and difficult, factual inquiries turning on the quantum, nature, and location of business done by each potential bankrupt, and on the particular existing regulatory schemes in the local jurisdictions involved.

The clear, consistent, and unambiguous language of Section 4 suggests that Congress envisaged a simpler role for its bankruptcy courts, and a brighter demarcation line for its potential petitioners, than the confusion which had prevailed under Section 4(b)'s language through 1910, and which is here proferred by IBB. As the Supreme Court has said:

> "* * * our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States,* 340 U.S. 593, 596 (1951).

This court should accept the plain, unstrained language of Section 4(a) and (b) and the judgment of Congress expressed by the generic phrase "banking corporation." Section 4(a) is the jurisdictional predicate for IBB's voluntary petition here. Its status as a banking corporation necessitates its exclusion from the benefits of the Act.

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* Exactly what new language IBB advocates is not clear, but F.D.I.C. suggests interminable difficulties would ensue in establishing and applying an exception to the exceptions, which would require Section 4 to be read as follows: "except a * * * banking corporation, except foreign banks, but not foreign banks qualified, licensed, or doing business in the States or Territories." Presumably, IBB would apply the same criteria to railroads and the other excepted corporations. On the face of it, any such use of language looks like new legislation.

POINT II

The History of the Language Used In Section 4 Since 1898 Indicates No Intention By Congress at Any Time to Make Any Type of Banking Corporation Subject to the Act.

At no time since the passage of the Act in 1898 has the language of Section 4 permitted any banking corporation to become either a voluntary or an involuntary bankrupt. Moreover, the clarity of the statutory words consciously chosen by Congress, and the analyses and explanations of the operative meaning of those words given by the successive draftsmen of Section 4 over the years, leave no room for speculation as to how Congress intended the Act to treat all banking corporations. Under the original (1898) and all successive enactments of Section 4, IBB as a banking corporation would have always been and is today precluded from the benefits of voluntary and involuntary bankruptcy.

A. The 1898 Act

Both the court below (A-60) and IBB (Brief for Appellant at 10) start their historical analysis of the Bankruptcy Act in 1898, quoting verbatim the original Section 4 (Pub. L. No. 171, ch. 541, §4, 30 Stat. 547).

In 1898 no corporation could become a voluntary bankrupt under Section 4(a). Section 4(b), pertaining to involuntary bankruptcy, was framed specifically to enumerate those persons and types of corporations—"manufacturing, trading, printing, publishing, or mercantile"—based upon principal business activity, which could become involuntary

bankrupts.* Banking corporations were not among the enumerated corporations, and thus could not be placed into involuntary bankruptcy under the 1898 Act. Judicial decisions under the 1898 Act support this view. *In re New York Building-Loan Banking Co.*, 127 F. 471 (S.D.N.Y. 1904); *Murphy* v. *Penniman*, 105 Md. 452, 66 A. 282 (1907).

IBB's entire argument for inclusion under Section 4 is premised on the sentence in the 1898 Act specifically enumerating private bankers as persons who could become involuntary bankrupts. *See* Brief for Appellant at 10-15. IBB argues that the "private banker" sentence had the effect of excluding from involuntary bankruptcy only banking corporations which were "national banks or banks incorporated under State or Territorial Laws." This is patently incorrect. In 1898, Section 4(b) was based on a scheme of explicit and enumerated inclusions in the Act. In expressing its inclusions, Congress consciously refrained from including *any* banking corporation within the first sentence of Section 4(b), which enumerates all the corporations eligible for involuntary bankruptcy under the 1898 Act.

The "private banker" sentence was added to Section 4 only during its final revisions in conference. The Statement to Accompany the Conference Committee Report, 31 Cong. Rec. 6426, 6426-28 (1898), explained succinctly the involuntary provision as to banking corporations:

> "The great railroad and transportation companies and banks *incorporated under any law* are left to be dealt with by the laws of the State creating them." *Id.* at 6427 (emphasis added).

* F.D.I.C. rejects IBB's contention that the history of Section 4(b) determines the construction of Section 4(a). However, as IBB would put decisive weight on the background of Section 4(b), F.D.I.C. is compelled to demonstrate the clear history of the language of Section 4 and the inaccuracies in IBB's historical and legal position in this regard.

Senator Knute Nelson, one of three U.S. Senators on the Conference Committee which added the "private bankers" sentence and otherwise finalized Section 4, *id.* at 6426, analyzed and explained to the Senate his Committee's reasoning in drafting the final version of Section 4 *and Section 4's intended operative effect,* in language omitted from IBB's comprehensive Brief:

> "Anybody can go into voluntary bankruptcy except a corporation * * * * In respect to involuntary bankruptcy, no farmer or wage-earner can be put into bankruptcy, no national bank or bank existing under State laws *or incorporated banks,* but private banks may, and then certain corporations, corporations engaged exclusively in manufacturing and mercantile pursuits, in printing and publishing, can be put into bankruptcy, *but no other corporations can.*" 31 Cong. Rec. 6298 (1898) (emphasis added).

The last sentence of Section 4(b) was drafted to insure the inclusion of individual private, but not corporate, banks in the enumerated list of eligibles for involuntary bankruptcy. *See In re Surety Guarantee and Trust Co.,* 121 F. 73 (7th Cir. 1902) (holding explicitly that the private banker language of Section 4(b) does not include a corporation).

The "private banker" sentence cannot, therefore, support IBB's inference that Congress in 1898 intended to subject foreign banking corporations to adjudication as involuntary bankrupts by excluding them from the exception to an inclusion. *See Murphy* v. *Penniman,* 105 Md. 452, 469 (1907). IBB's contorted reasoning from the negative is illogical and totally unsupported by statutory and judicial history. As Judge Lasker aptly stated, "we note the irony of IBB's position which depends on that portion of § 4(b) which specifies who may *not* be adjudged an involuntary

bankrupt in order to demonstrate who *may*. Such an analysis is especially weak where, as here, so little meaningful history is to be found." (A-73).

It is undisputed between the parties to this appeal that in 1898 by enactment of the predecessor of the present Section 2(a)(1) Congress for the first time made the provisions of a bankruptcy act applicable to *foreign* as well as domestic persons and corporations. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 Harv. L. Rev. 1025, 1035 (1946). The essential void in IBB's analysis is a failure to produce any evidence demonstrating any intent to have the jurisdictional provision of Section 4 of the 1898 Act operate differently upon foreign persons and corporations than on their domestic counterparts. Section 4(b) of the 1898 Act thus included all private bankers, certain natural persons, any *un*incorporated company, and certain enumerated corporations—be they domestic or foreign—as entities eligible for adjudication as involuntary bankrupts. By the same token foreign as well as domestic banking corporations were excluded from voluntary bankruptcy in 1898 by dint of corporate status, and from involuntary bankruptcy because they were not among the enumerated corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," *see In re New York Building-Loan Banking Co.*, 127 F. 471 (S.D.N.Y. 1904), nor were they private bankers, *see In re Surety Guarantee and Trust Co.*, 121 F. 73 (7th Cir. 1902).

B. The 1910 Act

In 1910, Section 4 was substantially amended. (Pub. L. No. 294, ch. 412, §§ 3-4, 36 Stat. 839).* The new language

* In 1903, as noted by IBB, Section 4(b) was amended by adding "mining" to the list of included corporations. Brief for Appellant at 15. This did not affect the excluded status of foreign banking corporations.

appears verbatim in the decision of the court below (A-64), and in IBB's Brief with additions and deletions from the earlier Section 4 indicated. Brief for Appellant at 15-16.

The 1910 amendment in relevant part included corporations within the purview of voluntary bankruptcy by extending those benefits to all persons "except a municipal, railroad, insurance or banking corporation." This exclusion of all banking corporations as a category applies today, as it did in 1910, to foreign banking corporations, such as IBB. *See* Point I, *supra.*

Section 4(b) relating to *involuntary* bankrupts was reformulated to parallel Section 4(a)'s method of inclusion by broad categories (*not* by an examination of actual or principal business done as provided by the Act of 1898), followed by exclusions by generic categories identical to those of Section 4(a). Amongst the excluded categories were banking corporations. Finally, the sentence relating to private bankers was deleted from the 1910 Act.

Cong. Sherley, who sponsored the 1910 Section 4 amendments, expressed during debate the intention to base inclusions and exclusions on scientific (generic) classifications, without recourse to inquiries into corporate activities. 45 Cong. Rec. 2275 (1910). Most importantly, he explained in subcommittee hearings that the intended effect of the amendments to Section 4(b) was not to change the law with respect to the ineligible corporations:

> *"There has been excepted out of the law always certain corporations—for instance,* municipal, railroad, insurance *or banking corporations*—on the theory that all of those corporations partook either of a public or quasi-public nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or

> involuntary proceedings. *This amendment does not, in that particular, change the law at all.* Now these particular corporations are exempted. What is here proposed is to permit the voluntary filing of a petition by a corporation." Hearing on H.R. 18694 Before Subcommittee No. 1 of the House Committee on the Judiciary, 61st Cong., 2d Sess. 4 (1910) (emphasis added).

Thus, based on the clear statutory language and the sponsor's statement of intent not to change the law, we find that in 1910 Congress still excepted banking corporations from the provisions of the Act as either voluntary or involuntary bankrupts, without any hint of a distinction between domestic and foreign, and without regard to any actual business done.

Of further import is the deletion of the "national banks, or banks incorporated under State or Territorial laws" language. In accord with the authorities presented in Point II.A immediately above, F.D.I.C. suggests that the presence or absence of the private bankers sentence had no effect on the inability of any banking corporation to become a bankrupt under the 1898 Act, and was enacted solely to make clear the eligibility of private bankers for involuntary petitions. It was, thus, extraneous language as to banking corporations and was dropped in the 1910 amendment. At least one court which has considered the effect on Section 4(b) of the entire "private bankers" sentence concluded after "a careful analysis" that:

> "in the context in which it originally appeared the specific reference to 'private bankers' added nothing to the force and meaning of the clause, and the words were evidently employed there ex industria, and were dropped in the amendment because superfluous." *In re Sage*, 224 F. 525, 537 (E.D. Mo. 1915), *aff'd.*, 236 F. 644 (8th Cir. 1916).

If, on the other hand, the 1898 exception of national, State and Territorial banks in the private bankers clause carried the attenuated, negatively-implied inclusion of foreign banks which IBB suggests, then the deletion of this language in 1910 is formidable and uncontroverted evidence of Congress's specific intent to include *foreign* banking corporations in the 1910 Section 4 exception. If Congress had intended the position advocated on this appeal by IBB, it merely would have left the limiting words in the Act. Deletion of these words was certainly not an amendment "by implication." Their deletion cannot simply be ignored as IBB in effect suggests (Brief for Appellant at 20), particularly when the precise sentence and Section were considered and dealt with by Congress.* *Cf. Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 448 (1901).

C. Section 4 Since 1910

Section 4 was next amended in 1932, when the list of excluded corporations of Section 4(a) and (b) was extended to cover "building and loan associations." (Pub. L. No. 27, 72d Cong., ch. 38, 47 Stat. 47). The House Committee Report accompanying the amendment stated that this addi-

* By direct analogy, the Act as amended in 1903 included a new "act of bankruptcy"—the situation where "because of insolvency a receiver or trustee has been put in charge of [the debtor's] property *under the laws of a State, or a Territory, or of the United States.*" Section 3(a)(4), 32 Stat. 797 (1903) (emphasis added). An appointment of a receiver or trustee abroad was not covered. In 1926 Congress amended the Act to delete the limiting language emphasized above, and made provision for the appointment of *any* receiver or trustee. Section 3(a)(5), 44 Stat. 663 (1926). Since 1926 it has been clearly recognized that the section covers the appointment of a foreign trustee in bankruptcy. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 Harv. L. Rev. 1025, 1039 (1946); *cf. In re Berthoud*, 231 F. 529, 532 (S.D.N.Y.), *appeal dismissed*, 238 F. 797 (2d Cir. 1916).

tional exclusion was the "only change which this bill makes in existing law." Brief for Appellant at 18, last paragraph, citing H.R. Rep. No. 98, 72d Cong., 1st Sess. 1 (1932).

Section 4 was amended again in 1935 (Pub. L. No. 60, ch. 114, § 1, 49 Stat. 246), in ways not relevant to or affecting the statutory language and issues in the instant case. Brief for Appellant at 19.

D. The Language of Section 4 Reflects A Clear Congressional Intent As to its Operative Effect

Judge Lasker correctly determined that the language of the statute, particularly where clear and logically applicable to IBB, is of necessity the primary and most fundamental guide to discerning Congress's intent. (A-59, -84). *See e.g., United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 277-78 (1929); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1916). This emphasis on statutory language to determine a statute's intended operative effect, rather than on what some legislators subjectively may have wanted to say but did not enact, has been a hallmark of judicial interpretation of statutes. Two eminent jurists have explained the simple underpinnings of this time-honored approach:

> "We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the statute." *Mitchell* v. *Great Works Milling Co.*, Fed. Case No. 9662 (1843) (Justice Story).
>
> "[T]he usage of Congress simply shows that it has spoken with careful precision, that its words mark

> the exact spot at which it stops * * *." *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 48 (1928) (Justice Holmes).

Since its passage in 1898, the Bankruptcy Act has been equally applicable to foreign and domestic persons and corporations. Since 1898 Section 4 has clearly excluded all banking corporations from the Act, as voluntary or involuntary bankrupts, in language so explained and analyzed by its sponsors and committee spokesmen,* and so applied by the courts. It is inconceivable that during careful consideration of Section 4 in 1898, in 1910, and at numerous other times, Congress intended to limit exclusions to enumerated domestic corporations but failed or chose not to express that intent. This court should not disregard Congress's chosen language and its explained meaning and operative intent, and should affirm the dismissal of IBB's bankruptcy petition.

POINT III

The Legislative History of Section 4(a) and Other External Interpretive Aids Cited by IBB Demonstrate No Congressional Purpose Supporting Any Distinction Whatsoever Between Foreign and Domestic Banking Corporations.

In an attempt to cloud the painfully apparent answer to the issue at hand, IBB introduces in its Brief extensive legislative debate, judicial discussion and legal commentary with respect to involuntary [Section 4(b)] bankruptcy to

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* Indeed, "precise analyses of statutory phrases by the sponsors of the proposed laws" are the *only* type of congressional history not viewed as highly suspect by the Supreme Court today. *S&E Contractors Inc.* v. *United States,* 406 U.S. 1, 13-14 n. 9 (1972).

demonstrate the alleged clear underlying purposes of Congress to include foreign banking corporations among the voluntary [Section 4(a)] beneficiaries of the Act. Brief of Appellant, Points II. A, B, C, at 10-29.

F.D.I.C. suggests, as it did to the court below, that no resort to legislative debate is needed or warranted in the face of clear statutory language and history. Be that as it may, should this court determine to examine legislative debate and other external sources to help interpret the statute involved, this court should be mindful that

> "'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions." *Ex Parte Collett*, 337 U.S. 55, 61 (1949).

Moreover, the plainer the statutory language, the more convincing contrary legislative history must be. *United States* v. *United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973).

A. Legislative Debate and Other Authorities Taken in Perspective Demonstrate No Clear Congressional Purpose to Exclude Only State-Regulated Banking Corporations.

IBB collects in its Brief, without any appropriate indications of relevance or weight, congressional committee reports, statements and explanations by sponsors and committee members, and floor debate by an individual member of Congress not connected with the drafting of, and actually opposed to, the 1898 bankruptcy bill. Committee reports analyzing a proposed bill and explanatory statements in the nature of supplemental reports made on the

House or Senate floor by committee members (*e.g.*, Sen. Nelson) or sponsors (*e.g.*, Cong. Sherley) may be used as an aid in the construction of doubtful or ambiguous statutory language. *United States* v. *Enmons*, 410 U.S. 396, 405 n. 14 (1973); *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13-14 n. 9 (1972); *United States* v. *Public Utilities Comm. of Calif.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring): *Railroad Commission of Wisconsin* v. *C.B. & Q. R.R.*, 257 U.S. 563, 589 (1922); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-75 (1921). On the other hand, the United States Supreme Court and commentators have suggested that statements of individual members of Congress during debate are not a safe guide, and should not be resorted to, or relied on, in ascertaining the meaning and purpose of statutory language. *S&E Contractors, Inc.* v. *United States, supra; Duplex Printing Co.* v. *Deering, supra; United States* v. *Public Utilities Comm. of Calif., supra; see* lower court opinion, n. 6 (A-87). Moreover, statements by members who oppose the bill and who do not represent the views of the draftsmen, of the committee, or of a majority of members should be given little or no weight on the issue of legislative meaning. See 2A Sutherland, *Statutory Construction* § 48.13 (4th ed. 1973); *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1313 n. 13 (1973) (opinion by Justice Marshall).

As evidence of congressional intent in 1898, IBB relies heavily on a speech made in floor debate by Cong. Robert N. Bodine concerning an earlier version of the bankruptcy bill as enacted. Brief for Appellant at 12-14. F.D.I.C. is constrained to point out that Cong. Bodine: (i) did not speak to or consider the question of foreign banks or corporations at all; (ii) was not a sponsor of the 1898 Act nor a member of any committee which drafted or conferenced on the legislation; and (iii) opposed and voted against both

the version of the bill to which he spoke and the final version of the bill as enacted with the language that IBB labels a response to his concerns. Lower court opinion (A-70); 31 Cong. Rec. 1946, 6436 (1898). Clearly Cong. Bodine's floor debate cannot be equated to any degree with congressional intent or purpose in enacting Section 4.

Moreover, Cong. Bodine's argument to exclude from the bill all state or national publicly-regulated corporations—offered by IBB as "the reason" for the exclusion of state (and not foreign) banks from the 1898 Act,* *see* Brief for Appellant at 19,

> "* * * suffers badly from the *lack of evidence in the history of section 4* that the rest of Congress shared Mr. Bodine's views. There is slight support in the deliberations preceding the passage of the Act of 1898, and in the debate preceding the exemption of building and loan associations, but hardly enough to sustain the proposition that Congress excluded banks, insurance corporations and building and loan associations primarily because they were so extensively regulated by the states. *The argument suffers, too, from Congress' failure to exclude all closely regulated enterprises from bankruptcy.*" Sovern, *Section 4 of the Bankruptcy Act: The Excluded Corporations,* 42 Minn. L. Rev. 171, 180-81 (1957) (emphasis added).

On this last point, the court below also recognized that "[i]f state regulation was indeed the motivation behind the banking corporation exception, then Congress was inconsistent in permitting private bankers to be adjudicated involuntary bankrupts in 1898, since allowing such an adjudication did in fact interfere with state regulation." (A-79). *See In re Salmon & Salmon,* 143 F. 395, 404-05

* As demonstrated in Point II.A, *supra,* not only state but all banking corporations were excluded from the 1898 Act. IBB's underlying premise (Brief for Appellant at 19) is wrong.

(W. D. Mo. 1906); *In re Faour*, 72 F.2d 719 (2d Cir. 1934); *In re Bajardi*, 9 F.2d 797 (2d Cir.), *cert. denied*, 270 U.S. 651 (1926). There was a similar interference with state regulatory schemes in the insurance area prior to the 1938 deletion of "any unincorporated company" from Section 4(b). *See In re Minnesota Insurance Underwriters*, 36 F.2d 371 (D. Minn. 1929); *Republic Underwriters* v. *Ford*, 100 F.2d 511 (5th Cir. 1938).

Finally, the Section 4 exclusions were extended to building and loan associations in 1932, despite the absence of alternative regulatory schemes in some states. The House Committee Report accompanying the bill, cited by IBB, indicates that the existence of specific regulatory schemes other than the Act was not the reason behind the exclusion of the entities mentioned in Section 4. Brief for Appellant at 18, citing H.R. Rep. No. 98, 72d Cong., 1st Sess. 1 (1932).

A close reading of the cases cited by IBB (Brief for Appellant, Point II.B, at 25-27) to support the existence of a strong or solitary "state regulatory scheme" purpose discloses initially that *no* court was considering the foreign/domestic issue. Thus, no court spoke in language attuned to or chosen to address the problem at hand. Second, the majority of courts considering the issue of congressional purpose in enacting the Section 4 exclusions, including this court, candidly admit, or else rely on other cases which admit, that "no reasons for making these exceptions were assigned by the committees of Congress", that "the purpose of the exception is not self-evident", that the underlying purpose of Congress must be "surmised" or "inferred". *See* Brief for Appellant at 22-25, citing *Union Guarantee & Mortgage Co.* v. *Van Shaick*, 75 F.2d 984 (2d Cir. 1935), and other cases. Third, the courts virtually all considered the excepted corporations as a uniform class, excluded for

the same reasons, and no courts assigned a single reason, as IBB suggests, for the Section 4 exceptions.

In sum, there is little support for IBB's contention that the existence of alternative state regulatory schemes guided or was a pivotal factor in the framing of the Section 4 exceptions. The dubious legislative history supporting this claimed congressional *purpose* cannot outweigh clear statutory language and history demonstrating congressional *intent* to exclude all banking corporations.

F.D.I.C. is obligated, however, to point out that *even if* the existence of alternative regulatory schemes was a factor in excluding banking corporations from the Act, IBB in England, and other foreign banks in their countries of origin, are invariably as regulated as are American domestic banks. IBB responds that "the laws of foreign countries cannot protect assets in the United States from being appropriated by individual creditors in the United States." Brief for Appellant at 32. However, it is equally true that the banking laws of any one state, for example, Iowa, cannot protect assets in another state (*e.g.*, New York). *Cf. Clark* v. *Williard,* 294 U.S. 211 (1935). The Iowa bank and its creditors are not given the benefits of the Bankruptcy Act, and no reason exists to extend these benefits to its foreign counterpart IBB and its creditors. Moreover, the Iowa and the British bank are *equally* subject to the same New York attachment laws or other legal or equitable doctrines, including the doctrine of comity should New York courts choose to apply it.

Finally, numerous states have no provision in their banking laws for avoidance of foreign state attachments or liens gained within four months of bankruptcy. *See e.g.,* Iowa Code Ann. §§524.1301 *et seq.* (1970); Mass. Ann. Laws, ch. 67, §§22 *et seq.* (1970). Any "American principles and policies" violated by local attachments (Brief for Appellant

at 32) are left equally unrectified by various state banking laws to which our Bankruptcy Act has deferred.

F.D.I.C. submits that, in the absence of a clear, unitary or conclusive congressional statement, it is somewhat simplistic to ascribe a single purpose or reason for the Section 4 exceptions. IBB's position (*see* Brief for Appellant at 31) becomes even more incredible when IBB attempts to demonstrate that the unambiguous statutory language of Section 4 is at odds with this (Cong. Bodine's) so-called singular congressional purpose.

B. Possible Congressional Purposes for the Section 4(a) Exceptions Are Equally Applicable to Foreign and Domestic Corporations

Courts and commentators have suggested that plausible alternative purposes for exclusion from the Act of the enumerated Section 4 corporations may have been:

> 1. the public or quasi-public nature of the business, involving interests other than those of creditors (*e.g.*, those of depositors);
>
> 2. the desirability of unarrested operation;
>
> 3. the inappropriateness of the bankruptcy machinery to managing their affairs. *See* lower court opinion (A-80 to -81), citing cases; Brief for Appellant at 28-29.

F.D.I.C. respectfully refers this court to, and must agree with, Judge Lasker's careful analysis and conclusion that as to each suggested purpose a foreign banking corporation stands on equal ground with its domestic counterpart (A-82 to -83). F.D.I.C. would only note, in addition, that each purpose expressed for the exceptions is based, as Cong. Sherley and the House (Judiciary) Committee in 1910 suggested, on the generic class and on the legal indicia and

relationships unique to these corporations—not on the quantum of activity in which they are engaged at a particular place at a particular time. This classification is supported by the ultimate rationale that foreign banks, insurance companies, etc. have responsibilities to the public similar to those of domestic banks, insurance companies, etc. In this context, IBB attempts to create a distinction without a difference.

Without effectively disputing the clear applicability of various congressional purposes to the exclusion in Section 4(a) of foreign as well as domestic banks, IBB bases its unsupported and specious argument for a distinction on whether the foreign bank is licensed, and how much business it does, in the jurisdiction. Brief for Appellant at 33. IBB's reasoning, based on falsely premised syllogisms, is unfounded. As noted above, IBB's distinction along the lines of actual activities has been rejected: by the U. S. Supreme Court in the *Vallely* case, see p. 10, *supra;* by this court's opinions, see p. 9 *supra;* by the court below (A-56 to -57); and by Congress itself in 1910, in rejecting a Section 4(b) "principal place of business" flexible criterion in favor of a clearly defined generic test, see pp. 9-10, *supra.* IBB's argument is hobbled by the need to use uncertain purposes to support numerous distinctions reflected nowhere in the history or language of Section 4, nor in the legal commentary that IBB cites. F.D.I.C. submits that IBB's categorization of itself as a non-banking entity for the purpose of gaining inclusion in the Act is without support.

In *In re Peoria Life Ins. Co.,* 75 F.2d 777 (7th Cir.), *cert. denied,* 296 U. S. 594 (1935), creditors of an insurance company which had ceased to do business attempted to avoid the insurance corporation exclusion of the Act, urging that Congress intended only to exclude corporations "presently engaged" in the business of insurance. The

court rejected the contention of the creditors that the legislative history of the Act made distinctions based upon the operations of such entities. The court stated:

> "It may well be that this was the intent of Congress, and we can easily understand that many beneficent results might be obtained by extending to such corporations the benefits of reorganization under the Act. However, if that were the purpose intended, certainly the language of the amendment was not happily chosen to bring it about. *The courts have no right to strain the language of a statute to bring about a result which it is claimed was the purpose of Congress in passing the statute, when its language in no way indicates that purpose.*" *Id.* at 778-79 (emphasis added).

* * *

Examining the remainder of the legislative history surrounding the enactment of Section 4 in 1898 and its amendment in 1910 and 1932, F.D.I.C. submits:

> (i) None of the legislative history set forth focuses on the question of whether foreign banking corporations were to be included within the benefits of the Act [See lower court opinion (A-60, -73)];
>
> (ii) A statement of the specific basis or *the* specific reason for the insertion of the "national, state and territorial" banking corporation language in the 1898 "private bankers" clause does not appear in the congressional history [See lower court opinion (A-73)]; and
>
> (iii) A statement of the specific basis or *the* specific reason or reasons for the exclusion of "banking corporations" from the 1910 Act to the present does not appear in the congressional history or in case law. *See* Sovern, *supra* at 182.

Judge Lasker, after careful consideration of the same material and basic arguments presented to the lower court by IBB (A-67 to -83), said:

> "We conclude that there is nothing inherent in the probable objectives of Congress which requires or suggests that the exclusion of 'banking corporations' from the coverage of the Act should apply to domestic but not foreign banks.[12]" (A-83)
>
> n.12. "Nor do we find any basis for distinguishing between banking corporations which are actively engaged in banking and those which are not. * * * The Act simply makes no such distinction as to domestic banks." (A-88)

The absence of "persuasive evidence" of any congressional purpose at odds with the clear and unambiguous language of Section 4 militates strongly in favor of a construction consistent with the statutory language. *Cf.* Brief for Appellant at 10; *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 48 (1928), cited in the lower court opinion. (A-59 to -60). This court should be loathe to replace "analysis of the statute * * * by psychoanalysis of Congress." *United States* v. *Public Utilities Comm. of Calif.,* 345 U.S. 295, 319 (1952) (Justice Jackson concurring); *see United States* v. *Constantine,* 296 U.S. 287, 298-99 (1936) (Justice Cardozo dissenting). A dismissal of the IBB petition, moreover, comports with the intended meaning of Section 4's chosen language, see Point II, *supra,* and with Cong. Sherley's clearly expressed intent, as sponsor of the 1910 language, to exclude banking and certain other corporations by a bright-line, scientific, generic classification, for whatever reasons.

POINT IV

Bankruptcy Act Principles of Equality of Distribution Are Not Involved here.

F.D.I.C. does not take issue with IBB's assertion at the outset of its Brief (Brief for Appellant, Point I) that equality of distribution is an aim of the Bankruptcy Act. However, IBB's argument based upon this aim totally ignores the fact that by Section 4(a) of the Act Congress specifically excluded certain types of corporations, considered by Congress as inappropriate, from the Act's application, and thereby consciously recognized that the aim of equality of distribution would necessarily lack universal application. See lower court opinion (A-84)*

IBB argues that if this court affirms the holding of the court below that the "banking corporation" exclusion of Section 4(a) of the Act extends to foreign banking corporations, a "vacuum" would be created by this court in the Act in which the bankruptcy court would be powerless to deal with the assets of a foreign banking corporation located in

* As IBB noted (Brief for Appellant at 2, n. 1), Honorable Roy Babitt, Bankruptcy Judge, Southern District of New York, faced the same basic issue presented herein *In the Matter of Banque de Financement S.A.*, No. 75 B 764, a Chapter XI proceeding. On January 12, 1976, Judge Babitt rendered a decision granting a motion to dismiss the debtor's petition for relief on the grounds (one of two alternate grounds) that the court lacked subject matter jurisdiction over the petition because pursuant to Section 4 a foreign banking corporation is "disentitled" to the benefits of the Act. Judge Babitt stated that "the controlling rule of law in this District is that a foreign banking corporation may not be a bankrupt," following Judge Lasker's decision in this case in the court below. Opinion (not yet reported) p. 8. Apparently Judge Babitt was untroubled by this clear operative effect of Section 4.

the United States. Brief for Appellant at 6. IBB apparently refuses to recognize that Congress, not this court, created any such "vacuum" in enacting Section 4. Moreover, if any such vacuum is created, it is no different from that which exists for domestic banking corporations, insurance companies, etc. which are conceded to be excluded from the Act by Section 4 and whose assets the bankruptcy court is necessarily powerless to deal with. IBB has not advanced a single reason why foreign banks should be singled out and treated differently from domestic banks or other entities excluded by Section 4 of the Act.

In *Clark* v. *Williard*, 292 U.S. 112 (1934), the Supreme Court addressed the equality of distribution concept where it was asked to determine the relative rights to property located in Montana of a dissolved Iowa insurance company (excluded from the Act) as between the insurance company's Iowa liquidator and Montana creditors who had attached the Montana assets. The Court said:

> "Business corporations may have their assets equally distributed through [bankruptcy] proceedings. But insurance corporations, like banks, are excluded from bankruptcy altogether * * *, and must submit to dismemberment, however great the waste or inequality unless receivers are appointed." *Id.* at 123-24.

The Supreme Court later held that the Montana creditors had superior rights to the Montana assets under state law and recognized that, in the case of corporations excluded from the Act, the choice between the goals of equality of distribution and protection of local creditors by state attachment laws was left to the state with jurisdiction over the insolvent's property, and that this choice is uncontrolled by federal law. *Clark* v. *Williard*, 294 U.S. 211, 214-15 (1935).

The court below properly determined that IBB's equality of distribution argument "presupposes jurisdiction under the Act and is of no relevance to the initial determination whether jurisdiction exists." (A-84). IBB cannot bootstrap itself into the court's jurisdiction by reference to remedial substantive benefits available to those entities included in the Act's coverage. As the United States Supreme Court made clear in *Vallely* v. *Northern Fire Ins. Co.*, 254 U.S. 348, 355 (1920), "there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them." The Supreme Court continued:

> "In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result. * * * For a court to extend the act to corporations of either kind is to enact a law, not to execute one." *Id.* at 355-56.

The right to confer and extend bankruptcy jurisdiction rests with Congress, not with the courts. IBB beseeches this court to place itself in the position of Congress and to legislate an exception to the "banking corporation" exception for certain foreign banks, based on individual factual determinations of what business they have done in the United States, and whether and where such banks are licensed to do such business. Brief for Appellant at 40. However, as one student of the judicial process has noted:

> "A judge must not rewrite a statute, neither to enlarge nor contract it. * * * Legislative words presumably have meaning and so we must try to find it. * * *

> "But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms. * * *
>
> "Violence must not be done to the words chosen by the legislature." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 533-4, 539, 543 (1947)

Section 4(a) of the Bankruptcy Act excludes all "banking corporations" from the benefits of the Act. The language is clear and unambiguous. The language's meaning and intent is consistent in its historical context and with the clear explanations of its draftsmen. The plain meaning of the words comports with all suggested reasonable congressional purposes in enacting the exception. The plain meaning of the statutory words has a sensible application in a 1976 context of ever-expanding international banking and other activities, and increasing recognition of international legal regulations.

IBB suggests an interpretation of the Section 4(a) exception which: contradicts the actual words of the statute; ignores and seeks to change clear analyses of the statute's operative effect; creates fundamental ambiguities and inconsistencies in the reading of Section 4; claims curiously to be mandated by an extremely unclear legislative history; looks for support to judicial decisions on unrelated points and to commentary which never addressed the issue; and includes for the first time in the Act a new group of corporations selected through ad hoc procedures and variable criteria.

IBB's attempt to convert this court into a legislature should be rejected.

CONCLUSION

The decision of the lower court dismissing IBB's bankruptcy petition for lack of jurisdiction should be affirmed.

Respectfully submitted,

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Service of two (2) copies of

the within Brief is hereby admitted this (1)

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